within the definition, and I therefore allow this appeal, quash the conviction, sentence, and the order for confiscation, and order that the fine, if paid, and the monies confiscated be repaid to the appellant.

Two other matters I should mention. In my view the charge includes two offences, namely the offence of selling a lottery ticket, and that of delivering a lottery ticket. The matter was not argued on the appeal, but in my view, where a section, as in this case, comprises more than one act which constituted an offence, the prosecution should make up their minds with which of those offences they propose to charge the accused. If they are not sure which of the offences the facts they can prove will establish against the accused, they should charge him with both offences in the alternative.

The other matter is this. Three charges were preferred against the accused, and at the conclusion of the case, the Magistrate convicted the accused on the third charge and stayed the other two. I think this practice is unsatisfactory. At the conclusion of the case the Magistrate should either convict or discharge, and not leave an accused person with other charges hanging over his head after the hearing has been concluded.

Appeal allowed.

Solicitor for the Appellant—*S. Veerasamy.*

[ORIGINAL CIVIL JURISDICTION]

TUEH GUAT CHOO alias TIN WAT CHOO (f)

vs.

CHEAH AH HOE and YONG POW MENG.

[PERAK CIVIL SUIT No. 160 OF 1932.]

Land Code 1926, Section 42—Indefeasibility of title of registered proprietor.

Held that "fraud" within the meaning of the land code means actual fraud and not what is known as constructive or equitable fraud.

Assets Company Ltd. v. Mere Roihi (1905 A.C. p. 176) and Waimiha Sawmilling Company Ltd. v. Waione Timber Company Ltd. (1926 A.C. p. 101) followed.

In 1924 the Plaintiff bought the land the subject-matter of this suit with moneys of her own and from her husband's Estate, and the title thereto was registered in the name of her son, the first defendant. Relations between the Plaintiff and the first defendant became unfriendly and on 17th day of August 1926 she lodged a caveat over the land in question. On October 8, 1929, the first defendant issued a warning to the caveat. On October 23, 1929, the Plaintiff instituted C.S. No. 581/29 against the first defendant for a declaration that he held the said land as trustee for her, for a transfer of the said land and for possession. On the same day the Plaintiff filed a summons for an extension of the caveat but the order was not obtained till November 4, 1929. On November 4, 1929, the first defendant charged the said land to the second defendant for $2,500. On March 16, 1931, judgment was given in favour of the Plaintiff in Civil Suit No. 581/29. On July 6, 1931, the second defendant obtained an order for sale under the charge. On March 6, 1932, the Plaintiff instituted this suit to have the said charge declared null and void and be cancelled, for an order to have the said order of sale set aside, for possession and mesne profits.

Johnson for Plaintiff

Joseph for Defendant No. 1

Seenivasagam (with him *Chin Swee Onn*) for Defendant No. 2.

Johnson opened on the facts. *Joseph* did not wish to address the Court. In closing the case for the Defendant No. 1. *Seenivasagam* submitted that accepting the Plaintiff's evidence without reservation the Plaintiff had failed to prove that defendant No. 2 was guilty of fraud within the meaning of the Land Code.

He referred to the Port Swettenham Case (1913 A.C. 491) and said it was thought in this country that the decision of the Privy Council in this case was to introduce equitable doctrines into the Land laws of the F.M.S. There was some justification for it prior to the 1926 Land Code, but there could be no doubt that such a view cannot be supported now in view of the repeal of various illustrations to the Specific Relief Enactment.

He cited:

Assets Company Ltd. v. *Mere Roihi* (1905 A.C. p. 176) and

Waimiha Sawmilling Company Ltd. v. *Waione Timber Company Ltd.* (1926 A.C. p. 101) followed.

and submitted that notice was not fraud within the meaning of the Land Code.

Johnson in reply contended that defendant No. 2 had full and actual notice of the Plaintiff's rights to the land in question and was guilty of fraud when he obtained the charge.

Cur. Ad. Vult.

GERAHTY, J.—By her plaint the Plaintiff claims (1) that a charge for $2.500.00 with interest in respect of the land comprised in Perak Grant for Land No. 15747 executed by the first defendant in favour of the second defendant be declared null and void and be cancelled;

(2) an order that the order of sale of the said charge dated 6th July, 1931, be cancelled and set aside;

(3) possession of the said land;

(4) Mesne profits from the 1st of February, 1932, till delivery and of possession of the said land;

(5) further and other relief and costs of the suit.

The facts of the case may be summaried as follows:—

The plaintiff is the widow of one Cheah Ah Lan and executrix of his estate. She obtained probate of his will on 22nd September, 1924. The first defendant is her son residing at Selama and the second defendant is a merchant and also resides at Selama. In 1924 the plaintiff bought the land the subject-matter of this suit with moneys of her own and from her husband's estate. The negotiations for the purchase of this land were carried out by the first defendant as trustee for and on behalf of the plaintiff and registration was effected in his name. The Plaintiff alleges that the title deed was retained in her possession and that in 1926 she discovered that it was missing and that the first defendant admitted he had taken possession of it.

The first defendant in fact deposited the said title deed with one Wong Chooi Cheng as security for a loan of $1,000.00 on a promissory note (Exhibit K.). Relations between the plaintiff and the first defendant became unfriendly. On 17th August, 1926, the plaintiff lodged a caveat over the land in question. The loan obtained by the first defendant from Wong Chooi Cheng was paid off in November, 1929, and the title deed was returned to the first defendant some ten days earlier. On 8th October, 1929, the first defendant issued a warning to the caveat.

On 23rd October, 1929, the Plaintiff instituted Civil Suit No. 581/29 against the first defendant for a declaration that the first defendant holds the said lands as trustee for the plaintiff, for a transfer of the lands and possession. On the same day the plaintiff filed a summons for an extension of the caveat which lapsed on 29th October, 1929, but for certain reasons did not obtain an order till the 4th November, 1929. The caveat was not therefore running between 29th October, 1929, and 4th November, 1929. On 30th October, 1929, the first defendant was served in Civil Suit 581/29. On 4th November, 1929, the first defendant charged the land to the second defendant. (Exhibit G.). On 16th, March, 1931, judgment was given in favour of the plaintiff in Civil Suit 581/29 (Exhibit J.) In June, 1931, the first defendant vacated the land. On 6th July, 1931, the second defendant obtained an order for sale under the charge. On 1st June, 1931, the plaintiff let the land to a monthly tenant at $25.00, per month. On 17th, January, 1932, the second defendant sent a notice to the tenant under Section 136 of the Land Code, 1926, requesting him to pay rent to him. The second defendant in his statement of defence of 8th May, 1932, states that so far no rent has been paid to him. On 16th March, 1932, the plaintiff instituted the present proceedings.

It is contended by the plaintiff that in making the charge the first defendant and the second defendant acted fraudulently and in collusion with each other and with intent to deprive the plaintiff of her property and further that no money passed by way of consideration for the said charge and that the same was made without consideration.

The Court is invited by counsel for the second defendant to find that the plaintiff has failed to prove that the first defendant was a trustee for her at the time of the making of the charge. I am of opinion, however, that the decree in Civil Suit 581/29 is conclusive on this point and I hold that on the 4th November, 1929, the first defendant was in fact a trustee for the plaintiff in respect of the property charged by him to the second defendant, and that the first defendant by so charging such property with full knowledge of the circumstances under which the plaintiff had instituted proceedings in respect of such property, deliberately did so fraudulently and with intent to deprive the plaintiff of that property. In regard to the question of consideration for the charge in my opinion the evidence is not such as to justify a negative finding.

I now come to consider whether (1) the second defendant acted fraudulently and in collusion with the first defendant and if so (2) whether such fraud, if any, is such as is contemplated by Section 42 of the Land Code, 1926.

Now what are the facts from which fraud and collusion should or should not be ascribed to the second defendant? Both defendants live in the village of Selama in close proximity to each other. They are men of more or less the same age and of the same social standing in the small community in which they live. The plaintiff has testified that both defendants have known each other for a long time and that they were close friends. The defendants themselves, however, have adopted the attitude that they were mere acquaintances. I am inclined to the view that the defendants were in fact more than mere acquaintances.

The plaintiff further alleges that she had several interviews with Yong Sin the father of the second defendant at which the second defendant himself was present and at which she asked Yong Sin to ask the first defendant to transfer the land to her and bring about a settlement.

The plaintiff further alleges that on 30th October, 1929, she met the second defendant on the road as she was going to the Court house in connection with service of process upon the first defendant. The second defendant denies this *in toto*—he merely admits that he had heard there was a quarrel between the plaintiff and the first defendant but that he did not know what the dispute was about. Here again it appears to me that the story told by the plaintiff is the more credible and that her evidence must be accepted.

Further there is the evidence of Pehi Mat bin Arris as to the conversation which he alleges he overheard between the first and second defendants at the Court house to the effect that the second defendant had suggested to the first defendant that he should charge the land to him in case his mother took action. I am of opinion that evidence of this nature must be entertained with extreme caution and on weighing the probabilities of the story told by this witness I am not disposed to attach any value to it.

On these facts I take the view that the second defendant was aware that the plaintiff was claiming this property and that the plaintiff had lodged a caveat in respect of that property. But that before the charge was made and registered the second defendant satisfied himself by inquiring from the first defendant that the caveat had been removed and that there is no evidence to shew that the second defendant was aware that application for extension of that caveat was then pending.

The question now arises can "fraud" within the meaning and for the purpose of Section 42 of the Land Code, 1926, be ascribed to him? It is provided by Section 42 of the Land Code, 1926, that (i) The title of a proprietor, chargee or lessee shall be indefeasible except as in this section provided. (ii) In the case of fraud or misrepresentation to which he is proved to be a party the title of such proprietor, chargee or lessee shall not be indefeasible.

It has been argued by Mr. Seenivasagam, counsel for the second defendant, that "fraud" in this section means actual fraud. In support of this contention he cites the cases of *Waimiha Sawmilling Company Ltd.* v. *Waione Timber Company Ltd.*, (1926) A.C. 101, and *Assets Company Ltd.* v. *Mere Roihi*, (1905) A.C. 176 and at 210. The former is an appeal from the Court of Appeal of New Zealand in which the Privy Council held that the circumstances in which the respondents had obtained registration in that case did not constitute "fraud" within the meaning of Section 58 of the New Zealand Land Transfer Act, 1915, and that the Respondent's title was not affected by the pendency of certain litigation with regard to appellants' rights under an agreement. On comparing the wording of Section 58 and Section 197 of the Land Transfer Act, 1915 (New Zealand) which are set out on page 105 in the judgment of Lord Buckmaster, and the wording of Section 42 of the Land Code, 1926, I am of opinion that "fraud" as used in the latter bears the same meaning as in the former.

In his judgment at page 106 (1926) A.C. Lord Buckmaster refers to *Assets Company* v. *Mere Roihi* (1905) A.C. 176, 210, and clearly lays down that fraud in actions seeking to affect a registered title "means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud." He points out that if the designed object of a transfer be to cheat a man of a known existing right that is fraudulent, but he goes on to say the act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest. This authority appears to me to be fatal to the plaintiff in this suit.

Lord Lindley in his judgment in *Assets Company Ltd.* v. *Mere Roihi* (1905) A.C. at p. 210 observes that, "The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him."

Mr. Johnson for the plaintiff argues that this passage strongly supports his case. He also cites Hogg's Australian Torrens System (1905 Edition) p. 835; but I have to ask myself—suppose the second defendant had made inquiries of the Plaintiff and not merely confined his inquiries to the 1st defendant before registering the charge what would the position have been then? He would have confirmed his suspicions if he did not know already that the plaintiff was making claim to the property the subject of the charge, and he might have learned that she had an application pending for an extension of the caveat, but since he was dealing with the registered proprietor could he have satisfied himself that the plaintiff had *"a known existing right."* The answer must be in the negative for the plaintiff so far as the second defendant is concerned, had no known existing right until 1½ years later when the decree was given in her favour on 16th March,

1931. In the circumstances I am of opinion that the second defendant cannot be said to have acted dishonestly or with deceit and that "fraud" within the meaning of Section 42 (ii) of the Land Code, 1926, cannot be ascribed to the second defendant and accordingly paragraphs A, B, C and D of the plaintiff's prayer cannot be granted and the suit must be dismissed with costs in favour of the second defendant.

The position of the first defendant in my opinion differs entirely from that of the second defendant for he had full knowledge of events which led up to the registration of the property in question in his name and that he held the lands as trustee for the plaintiff. He admitted in cross-examination that he got a summons on 26th October, 1929, for an extension of the Caveat and that when he made the charge on the 4th November, 1929, the application was pending. He goes on to say that he did not tell the second defendant of this because he was in debt and he was afraid the second defendant would not give him the money. This confirms me in finding that the second defendant was not a party to the fraud of the 1st defendant. In view of my findings in respect of the first defendant I make no order as to his costs.

Judgment for the Defendants.

[ORIGINAL CIVIL JURISDICTION]

RE H. A. PEREIRA

EX PARTE PAGOR SINGH (BHAGAT SINGH.)

[PERAK BANKRUPTCY No. 96 OF 1932.]

Bankruptcy Notice—Effect of order for payment of Debt by instalments.

The effect of obtaining an order for the payment of a judgment debt by instalments is to defeat bankruptcy proceedings in respect of the judgment debt in question, if the order for payment by instalments is made before an act of bankruptcy is committed. A Bankruptcy Notice, which is founded on the judgment as it originally stood, is thereby invalidated.

Creditor in person.

S. K. Dass for the debtor.

Cur. Ad. Vult.

MUDIE, J.—This is an application to set aside a Bankruptcy Notice on the ground that an order was subsequently made for payment of the judgment debt by instalments.

The Bankruptcy Notice was issued on the 30th June, 1932, and served on the debtor on the 7th July, 1932. The order for payment by instalments was made on the 5th July, 1932.

It is argued for the applicant that as long as the order for payment of the debt by instalments is in force, execution on the judgment will not be issued, *Montgomery & Co.* v. *De Blumes* (1898) 2 Q.B. 420 and a Bankruptcy Notice on the judgment will not issue.

The respondent contends that when the Bankruptcy Notice was issued, it was a good notice, and is not invalidated by an order subsequently made for payment by instalments.

The ground of the judgment in *Montgomery & Co.* v. *De Blumes* is that the judgment was modified by the order for payment by instalments. Chitty, L. J., in the course of his judgment says "It seems to me that so long as the county Court judge's order stands there is a modification of the order of the High Court; and it would involve a great injustice to a defendant if it were not so. The defendant is told that he is to pay by instalments, and the instalments in such a case are generally small..... A man in such a position exerts himself in order to get the money together for the purpose of complying with the order. He does so under stress of a liability to imprisonment if he makes default, but I think he would be likely to be misled, and it would put him in a hard position if he were told that he was still liable, in spite of that, to pay the whole debt, and that what goods he had could be taken in execution."

In my view the same principle is applicable to a Bankruptcy Notice. The judgment is modified by the order for payment by instalments, and it seems to me that the Bankruptcy Notice, which is founded on the judgment as it originally stood, is thereby invalidated.

This case is distinguishable from *Re a Debtor, ex parte Rock Red Brick Company* (1904) 90 L.T. 64; 52 W.R. 302, where an act of bankruptcy was committed before an order for payment by instalments is to defeat bankruptcy proceedings in respect of the judgment debt in question, if the order is made before an act of bankruptcy is committed.

The Bankruptcy Notice will be set aside. There will be no order as to costs.